No. 92-1721

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

EDNA HARRIS,

Petitioner,

vs.

AMERICAN MEDICAL INTERNATIONAL, INC.; WALTER WEISMAN; WALTER GEORGE; DAVID GORE; SHIRLEY HOFFMAN; PRESBYTERIAN/SAINT LUKE'S MEDICAL CENTER; JEANNE COAKLEY BEETHE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS AMERICAN MEDICAL INTERNATIONAL, INC., WALTER WEISMAN, WALTER GEORGE, DAVID GORE, SHIRLEY HOFFMAN AND JEANNE COAKLEY BEETHE

STEVEN A. SHAPIRO
Counsel of Record
HARDING & OGBORN
Attorneys for Respondents American Medical International, Inc., Walter Weisman, Walter George, David Gore, Shirley Hoffman and Jeanne Coakley Beethe
1200 17th Street
Suite 1000
Denver, Colorado 80202
(303) 629-0300

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Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

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No. 92-1721

In The

Supreme Court of the United States

October Term, 1992

EDNA HARRIS,

Petitioner,

vs.

AMERICAN MEDICAL INTERNATIONAL, INC.; WALTER WEISMAN; WALTER GEORGE; DAVID GORE; SHIRLEY HOFFMAN; PRESBYTERIAN/SAINT LUKE'S MEDICAL CENTER; JEANNE COAKLEY BEETHE,

Respondents.

On Petition to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS' AMERICAN MEDICAL INTERNATIONAL, INC., WALTER WEISMAN, WALTER GEORGE, DAVID GORE, SHIRLEY HOFFMAN, AND JEANNE COAKLEY BEETHE

STATEMENT OF THE CASE

A. Factual Background.

Ms. Harris, a black licensed practical nurse, was employed at

Presbyterian/St. Luke's Medical Center from 1981 to September 24, 1985. In December of 1984, Jeanne Coakley Beethe, the Petitioner's supervisor, suspended Ms. Harris for three days without pay, as a result of her leaving an elderly patient lying on the floor in her room for over an hour and for not requesting assistance from other hospital personnel in order to return the patient to her bed. The suspension was implemented in compliance with applicable Medical Center procedures.

Shortly thereafter, Ms. Harris was involved in another incident in which she departed her unit without being relieved by another nurse, resulting in the unit being without a licensed professional for a period of time. Ms. Harris also left the keys to the narcotic cart in an unsecured area. In response to a later inquiry, the hospital was advised by the Colorado Board of Nursing to formally report the two incidents. After its investigation, the Colorado Board of Nursing issued a letter of reprimand to Ms. Harris, concluding that she had failed to provide appropriate patient care. Ms. Harris filed suit against Presbyterian/St. Luke's Medical Center and Jeanne Coakley Beethe, contesting the suspension and the report to the Board of Nursing, alleging racial discrimination and retaliation under 42 U.S.C. § 1981. That action was subsequently dismissed on motion for summary judgment.

The assets of Presbyterian/St. Luke's Medical Center were sold to American Medical International, Inc. in September of 1985. Ms. Harris continued to work for the hospital until June of 1988 when, after having received a final letter of warning for insubordination to her supervisor, she was terminated for cause after threatening to retaliate against patients under her care. This suit followed her termination.

B. Procedural Background.

In her amended complaint, Petitioner sought relief under 42 U.S.C. § 1981, contending that her firing was discriminatory and

that it was in retaliation for her filing, some three years earlier, of the racial discrimination charge and lawsuit against Presbyterian/ St. Luke's Medical Center ("PSL") and her former supervisor. Ms. Harris also asserted claims under 42 U.S.C. §§ 1985(3) and 1986, alleging that the Respondents engaged in a conspiracy to deprive her of federally protected rights and that having knowledge of this conspiracy, the Respondents failed to prevent it.

Respondents American Medical International, Inc., Walter Weisman, Walter George, David Gore, Shirley Hoffman, and Jeanne Coakley Beethe ("non-PSL Respondents") filed a motion to dismiss pursuant to Fed. R. Civ. P. 12, arguing that the Petitioner's complaint failed to state a cognizable claim for relief in light of this Court's decision in *Patterson v. McClean Federal Credit Union*, 491 U.S. 164, 109 S. Ct. 2363 (1989). Respondent Beethe also asserted that the Petitioner's complaint failed to articulate any basis for claims asserted against her and did not even identify her in any of the allegations. The district court granted the motion to dismiss as it related to Respondent Beethe, but otherwise denied the dismissal motion.

The remaining non-PSL Respondents subsequently filed a motion for partial summary judgment, contending that the § 1985(3) conspiracy claim was barred by the intra-corporate conspiracy doctrine and that dismissal of that claim would also dictate the dismissal of the § 1986 claim, which was dependent upon it.

The trial court granted the motion for partial summary judgment on January 29, 1991, dismissing the §§ 1985(3) and 1986 claims after holding that the amended complaint failed to establish any conspiracy with the requisite specificity, and that the conspiracy claim was barred by the application of the intra-corporate conspiracy principle. Although Petitioner's counsel submitted five volumes of depositions with his response in

opposition to the motion for partial summary judgment, he did not identify even a single question or answer from any of the depositions in support of his legal position.

In May of 1991, the trial court ordered the parties to submit legal briefs regarding the remaining § 1981 claim, in light of recently announced opinions of the Tenth Circuit Court of Appeals. After briefs were submitted by the parties, the trial court subsequently dismissed the remaining claim, holding that discriminatory discharge is not actionable under § 1981 as a matter of law because it does not involve conduct which impairs the right to enforce contractual obligations.

On appeal, the Tenth Circuit Court of Appeals affirmed the trial court's dismissal of the Petitioner's claims, concluding that the Petitioner had failed to specifically articulate the factual basis for the § 1985(3) conspiracy claim and that the § 1981 claim had been properly dismissed in light of the Tenth Circuit opinions in *Trujillo v. Grand Junction Regional Center,* 928 F.2d 973 (10th Cir. 1991), and *Carter v. Sedgwick County,* 929 P.2d 1501 (10th Cir. 1991). The appellate court, like the trial court below, refused to sift through volumes of undesignated materials which accompanied the Petitioner's appellate brief.

REASONS FOR DENYING THE WRIT

The Petitioner apparently seeks to have this Court review only the actions below which relate to the dismissal of the conspiracy claim asserted under 42 U.S.C. § 1985(3) and the dependent § 1986 claim. The Petitioner argues that in affirming the dismissal of the conspiracy claims and the actions of the district court the Tenth Circuit so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The Petitioner's arguments are unpersuasive and without legal or factual merit, and accordingly should be rejected.

In ruling that Petitioner's amended complaint failed to allege facts with the specificity required to sustain a claim under § 1985(3), both the trial court and the appellate court applied the appropriate legal standard. It has long been the law in the Tenth Circuit, and elsewhere, that a claim of conspiracy asserted under §1985(3) cannot survive a dismissal motion if it contains merely conclusory allegations of conspiracy which are not supported with references to material facts. *Drake v. City of Fort Collins*, 927 F.2d 1156 (10th Cir. 1991); *Durre v. Dempsey*, 869 F.2d 543 (1989); *Clulow v. Oklahoma*, 700 F.2d 1291 (10th Cir. 1983); *Lessman v. McCormick*, 591 F.2d 605 (10th Cir. 1979). *See also City of Omaha Employees Betterment Ass'n v. City of Omaha*, 883 F.2d 650 (8th Cir. 1989); *Slotnick v. Stavisky*, 560 F.2d 31 (1st Cir. 1977); *Robinson v. McCorkle*, 462 F.2d 111 (3d Cir. 1972); *Johnson v. Stone*, 268 F.2d 803 (7th Cir. 1959).

The Petitioner's amended complaint was fatally deficient, in that it failed to articulate, on any level, the factual basis to support a claim of conspiracy. Both courts below properly applied the appropriate legal standard, and their actions cannot be characterized as a departure from the accepted and usual course of judicial proceedings.

The Petitioner's argument that she was denied the opportunity to conduct discovery so as to ascertain the necessary conspiratorial linkage between the Respondents is most curious when considered in conjunction with the Petitioner's argument that the courts below failed to properly consider the volumes of material which were presented to the courts in an effort to avoid dismissal. The Petitioner's argument on this point is disingenuous at best.

In her brief, the Petitioner acknowledges that the depositions of Respondents George, Gore and Hoffman, the persons most directly involved in the termination of Ms. Harris, were available prior to the court's ruling on the motion for partial summary

judgment. Written discovery, which included requests for production of documents, was also completed. The record below shows that the Petitioner not only had ample opportunity to conduct discovery, but that she in fact had completed a significant amount of discovery prior to the trial court's ruling. The Tenth Circuit properly reviewed the trial court's actions, utilizing the deferential, abuse of discretion standard set forth in *Patty Precision v. Brown and Sharpe Mfg. Co.*, 742 F.2d 1260 (10th Cir. 1984). The abuse of discretion standard was properly utilized by the Tenth Circuit in reviewing and affirming the actions of the district court with respect to this discovery issue. *Refac Intern Ltd. v. Hitachi Ltd.*, 921 F.2d 1247 (C.A. Fed. 1990); *Earley v. Champion Intern Corp.*, 907 F.2d 1077 (11th Cir. 1990); *Herring v. Delta Air Lines, Inc.*, 894 F.2d 1020 (9th Cir. 1990), *cert. denied*, 494 U.S. 1016, 110 S. Ct. 1319 (1990); *Deitchman v. E. R. Squibb & Sons*, 740 F.2d 556 (7th Cir. 1982).

The Petitioner next argues that both the trial court and the appellate court improperly failed to consider the undesignated discovery material tendered to the courts. Such an argument is legally unpersuasive for at least two reasons. As noted by Judge Moore in the Tenth Circuit opinion, neither a trial court nor an appellate court is required to "sift through materials submitted in bulk to determine whether there exists some dormant evidence supporting a party's assertions."

In *Celotex v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553 (1986), this Court held that Rule 56(e) of the Federal Rules of Civil Procedure "requires the non-moving party to go beyond the pleadings and by [his] own affidavits, or by the 'depositions, answers to interrogatories and admissions on file,' *designate* 'specific facts showing that there is a genuine issue for trial' " (emphasis supplied). *Accord, Thomas v. Wichita Coca Cola Bottling Co.*, 968 F.2d 1022 (10th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 635 (1992); *SEC v. Thomas*, 965 F.2d 825 (10th Cir. 1992).

The Petitioner's argument that she "was under no obligation to provide 'particularized citations' or otherwise limit the evidentiary materials" is a misstatement of existing law, and assumes that courts have both the time and the duty to make the Petitioner's case for her. As has been her pattern in the courts below, the Petitioner here also fails to identify a single fact somewhere buried within the volumes of material submitted to the courts which would have created a factual dispute so as to render summary judgment inappropriate. The simple reality of the situation, and the only conclusion that can be drawn from Petitioner's failure to designate any materials, is that no such facts existed.

Secondly, although the Tenth Circuit Court of Appeals did not address the intra-corporate conspiracy principle, the trial court correctly noted that all of the individual Respondents were employees of the corporate owner of the hospital. While the Tenth Circuit as yet may not have decided the issue, the circuits which have addressed it have held that a conspiracy claim is not properly asserted under § 1985(3) when a single business entity is responsible for an action which results in the impairment of an individual's ability to make or enforce contract rights. As noted by the Eighth Circuit in *Cross v. General Motors Corp.*, 721 F.2d 1152, 1156 (8th Cir. 1983), a corporation and its agents are "a single person in the eyes of the law, and a corporation cannot conspire with itself." *See also Doherty v. American Motors Corp.*, 728 F.2d 334 (6th Cir. 1984); *Girard v. 94th Street & Fifth Avenue Corp.*, 530 F.2d 66 (2d Cir. 1976), *cert. denied*, 425 U.S. 974 (1976); *Baker v. Stuart Broadcasting Co.*, 505 F.2d 181 (8th Cir. 1974); *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972).

There is nothing contained within the undesignated materials furnished to the courts below which would remove Petitioner's claim from the application of the intra-corporate conspiracy doctrine. As a result, dismissal of the conspiracy claim was

appropriate on either ground relied upon by the trial court, and the actions of the Tenth Circuit are certainly not a departure from accepted judicial practice.

The Petitioner's final argument, that a document was withheld during discovery and that the conspiracy claim should be reinstated as a result, is both factually and legally unsound. The trial court made a de novo review of this issue and properly concluded that the document was produced to Petitioner's counsel upon its discovery and that sanctions under Rule 11 were not appropriate. The trial court also specifically noted that the dismissal of the conspiracy claims was predicated, in part, on the intra-corporate conspiracy principle, which legal finding was unaffected by the memorandum.

The Tenth Circuit properly applied the abuse of discretion standard in reviewing the trial court's actions and observed that the document in question did not "reflect or suggest a racially motivated conspiracy, which of course is the cornerstone of the § 1985(3) claim plaintiff sought to have reinstated." In *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 110 S. Ct. 2447 (1990), this Court specifically held that appellate courts should apply an abuse of discretion standard in reviewing all aspects of a district court's Rule 11 determination.

CONCLUSION

The Petitioner has failed to establish any basis for her claim that the appellate court departed from accepted and usual judicial practice. In affirming the judgment entered in favor of Respondents American Medical International, Walter Weisman, Walter George, David Gore, Shirley Hoffman and Jeanne Coakley Beethe, the Tenth Circuit Court of Appeals correctly applied the law to the facts as established in the district court. As a result, these Respondents respectfully request that the Court deny the petition for certiorari.

Respectfully submitted,

STEVEN A. SHAPIRO
Counsel of Record
HARDING & OGBORN
Attorneys for Respondents
American Medical International, Inc.,
Walter Weisman, Walter George,
David Gore, Shirley Hoffman and
Jeanne Coakley Beethe
1200 17th Street
Suite 1000
Denver, Colorado 80202
(303) 629-0300

APPENDIX A — ORDER DENYING MOTION FOR SANCTIONS AND DISMISSING ACTION FILED SEPTEMBER 9, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-Z-758

EDNA RUTH HARRIS,

Plaintiff,

v.

AMERICAN MEDICAL INTERNATIONAL, INC., WALTER QEISMAN, WALTER GEORGE, DAVID GORE, and SHIRLEY HOFFMAN,

Defendants.

ORDER DENYING MOTION FOR SANCTIONS AND DISMISSING ACTION

The matters before the Court are Plaintiff's Motion For Sanctions Pursuant To Fed. R. Civ. P. 11 And Request To Stay Discovery and this Court's *sua sponte* determination of whether plaintiff has stated a claim upon which relief may be granted, in view of recent rulings by the United States Court Of Appeals For The Tenth Circuit. Jurisdiction is appropriate under 28 U.S.C. § 1331.

On May 10, 1991, plaintiff filed her Amended Complaint And Jury Demand, in which she asserted claims under 42 U.S.C. §§ 1981, 1985(3) and 1986, arising from plaintiff's June 6, 1988, discharge from employment as a licensed practical nurse. By Order of Dismissal Of Certain Defendants, dated September 19,

1990, the Court dismissed defendant Presbyterian/Saint Luke's Medical Center, as well as defendant Jeanne Coakley Beethe. At that time, the Court denied defendants' motion to dismiss to the extent it was based on the assertion that, after *Patterson v. McLean Credit Union,* 491 U.S. 164 (1989), discriminatory and retaliatory discharge were not actionable under 42 U.S.C. § 1981. After a hearing on January 19, 1991, the Court granted defendant's Motion For Partial Summary Judgment and dismissed plaintiff's claims brought under 42 U.S.C. §§ 1985(3) and 1986. Plaintiff's § 1981 claim based on alleged discriminatory and retaliatory discharge is her only remaining claim.

I. Plaintiff's Motion For Sanctions

Plaintiff has moved for sanctions against Defendant American Medical International, Inc. (AMI) and its attorney Richard L. Thorgren based on their failure to reasonably inquire into the existence of a document when responding to plaintiff's document production requests. Plaintiff claims the document, produced on March 1, 1991, was critical to her 42 U.S.C. § 1985 claim, dismissed by this Court on January 29, 1991.

Pursuant to 28 U.S.C. § 636(b)(1)(A) and Local Rule 602.A., this motion was referred to Magistrate Judge Richard M. Borchers for the purpose of making a recommendation to the Court. A hearing was held before Magistrate Borchers on April 2, 1991. On April 9, 1991, the Magistrate filed a Recommendation Of United States Magistrate Judge, in which he recommended that plaintiff's motion for sanctions under Rule 11 be denied, and that this Court *sua sponte* reconsider the dismissal of plaintiff's 42 U.S.C. § 1985 claim, in view of the production of the new document.

Plaintiff has filed objections to the Magistrate's

recommendation. Pursuant to 28 U.S.C. § 636(b)(1), the Court must make a *de novo* determination of those portions of the Magistrate's Recommendation to which objections are made.

The subject document is a March 28, 1988, memorandum from David J. Gore to J. Rock Tonkel concerning an anonymous letter attributed to plaintiff. Although plaintiff made requests for documents on September 27, 1990, and December 10, 1990, the memorandum was not delivered to plaintiff until March 1, 1991. In its November 27, 1990, and December 20, 1990, responses to plaintiff's first and second requests for production of documents, AMI stated that it would make available for copying and inspection the personnel records of, among others, Shirley Hoffman, and would produce all documents relating to the decision to terminate plaintiff and to the facts and reasons which formed the basis for that decision. The first response was signed by both Richard Thorgren and Thomas Sawicki, Senior Vice President of AMI. The second response was signed by Richard Thorgren. On January 21, 1991, Richard Thorgren assured plaintiff that all the requested documents, with the exception of those to which AMI objected, had been delivered to plaintiff.

At the hearing before the Magistrate, AMI's counsel indicated tht he delivered the memorandum to plaintiff as soon as it was provided to him and that he was unaware of its existence prior to that time. The Magistrate concluded that AMI could not be liable under Rule 11, because there was no evidence showing that AMI or an agent of AMI withheld the memorandum. Additionally, the Magistrate determined tht because plaintiff provided no evidence that Mr. Thorgren knew of the existence of the memorandum, Rule 11 sanctions were not appropriate. The Magistrate did not address plaintiff's motion to stay discovery.

Appendix A

In her objections, plaintiff correctly argues that Rule 11 sanctions may be imposed for a failure to make a "reasonable inquiry" into whether the signed pleading, motion, or other paper is grounded in fact. Fed. R. Civ. P. 11 states in pertinent part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact . . . .

However, plaintiff has failed to present any convincing evidence that AMI, one of its agents, or Mr. Thorgren failed to make a reasonable inquiry into the existence of the March 28, 1988, memorandum. The fact that the memorandum was in the personal possession of defendant Shirley Hoffman does not in and of itself establish that AMI failed to make a reasonable inquiry into its existence. Misplacement of papers is a common occurrence, and it is not unusual for a person to be unable to remember each document generated over a number of years.

Similarly, the fact that AMI's counsel had his paralegal gather the documents requested by plaintiff, does not establish that he failed to make a reasonable inquiry into the existence of the memorandum. There is no evidence that the paralegal was instructed other than to produce all the relevant documents AMI had provided Mr. Thorgren, or that Mr. Thorgren did not properly ask AMI to produce the requested documents. The evidence indicates that when the memorandum was located, it was provided to Mr. Thorgren, who immediately disclosed it to plaintiff's counsel.

Appendix A

This Court dismissed plaintiff's conspiracy claim brought under 42 U.S.C. § 1985, because it concluded that the claim was barred by the intracorporate conspiracy doctrine. Therefore, the production of the memorandum is not relevant to the Court's prior holding and does not necessitate reconsideration of Defendants' Motion For Partial Summary Judgment.

II. Plaintiff's Claims of Discriminatory and Retaliatory Discharge

On May 17, 1991, the Court *sua sponte* issued a minute order requesting the parties to file briefs analyzing the effect on this case of the recent opinions of the United States Court Of Appeals For The Tenth Circuit, *Trujillo v. Grand Junction Regional Center,* 928 F.2d 973 (10th Cir. 1991), and *Carter v. Sedgwick County,* 929 F.2d 1501 (10th Cir. 1991), in which the Tenth Circuit held that discriminatory discharge is not actionable under 42 U.S.C. § 1981. Additionally, the Court referred the parties to a recent order of this Court, *Brito v. AT&T,* 90-Z-53 (D. Colo. April 25, 1991), holding that retaliatory discharge is not actionable under 42 U.S.C. § 1981. The Court reserved ruling on Plaintiff's Motion To Add Defendants And To Assign Case For Jury Trial. Briefs were filed on May 21, 1991. The Court has reviewed the parties' briefs and plaintiff's request to present six volumes of evidentiary materials and determined that oral argument would not materially assist the Court in determining this purely legal issue.

The United States Court Of Appeals For The Tenth Circuit has ruled that discriminatory discharge is not actionable under 42 U.S.C. § 1981, because it does not involve conduct which impairs the right to enforce contract obligations. *See, Trujillo v. Grand Junction Regional Center,* 928 F.2d 973 (10th Cir. 1991), and *Carter v. Sedgwick County,* 929 F.2d 1501 (10th Cir. 1991). Although this Court may not agree with the conclusion that

discharge does not impair the right to enforce contract obligations, this Court is bound to follow Tenth Circuit law. Although the Tenth Circuit has not expressly ruled that retaliatory discharge is not actionable, plaintiff has not presented any argument that retaliatory discharge should be treated differently than discriminatory discharge. Moreover, the Tenth Circuit's analysis regarding discriminatory discharge appears to apply to retaliatory discharge as well; both types of discharge occur after initial formation of the contract at issue. Accordingly, the Court determines that 42 U.S.C. § 1981 does not protect individuals from retaliatory discharge. For the reasons stated above, it is

ORDERED that Plaintiff's Motion For Sanctions Pursuant To Fed. R. Civ. P. 11 is denied. It is

FURTHER ORDERED that plaintiff's Request To Stay Discovery is moot. It is

FURTHER ORDERED that the claims brought under 42 U.S.C. § 1981 are dismissed, and this cause of action is dismissed with prejudice. It is

FURTHER ORDERED that Plaintiff's Motion To Add Defendants And To Assign Case For Jury Trial is moot.

DATED at Denver, Colorado, this 9th day of September, 1991.

BY THE COURT:

s/ Zita L. Weinshienk
ZITA L. WEINSHIENK
United States District Court

APPENDIX B — MINUTE ORDER FILED MAY 17, 1991

IN THE UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-Z-758

EDNA RUTH HARRIS,

Plaintiff,

v.

AMERICAN MEDICAL INTERNATIONAL, INC.; et al.,

Defendants.

MINUTE ORDER

ORDER ENTERED BY JUDGE ZITA L. WEINSHIENK

Joan E. Boline, Administrative Secretary

Dated: May 17, 1991

In view of the recent opinions of the United States Court of Appeals For The Tenth Circuit, *Trujillo v. Grand Junction Regional Center,* 928 F.2d 973 (10th Cir. 1991), and *Carter v. Sedgwick County,* No. 89-3005, 1991 WL 45936 (10th Cir. 1991), holding that discriminatory discharge is not actionable under 42 U.S.C. § 1981, it is

ORDERED that the parties shall file briefs analyzing the effect of the recent decisions on this case, on or before May 21, 1991, not to exceed five pages double-spaced. It is

FURTHER ORDERED that the Court reserves ruling on

Appendix B

Plaintiff's Motion To Add Defendants And To Assign Case For Jury Trial.

The parties are additionally referred to page 3 of the attached recent order of this Court in *Brito v. AT&T*, 90-Z-53 (April 25, 1991), which discusses retaliatory discharge, and to *Hill v. Goodyear Tire & Rubber, Inc.*, 918 F.2d 877 (10th Cir. 1990).

APPENDIX C — MOTION FOR PARTIAL SUMMARY JUDGMENT FILED DECEMBER 5, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90 Z 758

EDNA RUTH HARRIS,

Plaintiff,

v.

AMERICAN MEDICAL INTERNATIONAL, INC., et al.

Defendants.

The Defendants, by and through counsel of record, respectfully move the Court for the entry of partial summary judgment as to the claims based on 42 U.S.C. § 1985(3) and 1986, and as grounds therefor state as follows:

1. In her Amended Complaint the Plaintiff seeks relief pursuant to 42 U.S.C. §§ 1981, 1985(3) and 1986. The Plaintiff alleges tht her discharge from employment as a licensed practical nurse in July of 1988 was discriminatory and retaliatory, in violation of 42 U.S.C. § 1981.

2. Additionally, the Plaintiff alleges that Defendants American Medical International, Inc., Walter Weisman, Walter George, David Gore and Shirley Hoffman engaged in a conspiracy with each other for the purpose of depriving the Plaintiff of equal protection of laws or of equal privileges and immunities under the laws, in violation of § 1985(3). (Complaint ¶ 2). Finally, the Plaintiff alleges that the Defendants also violated § 1986, by their failure to prevent the wrongs complained of despite having knowledge of the same.

Appendix C

3. A claim for relief under § 1985(3) requires "two or more persons" to have conspired to discriminate by depriving a person of his or her ability to make or enforce a contract. However, in the instant case, the Plaintiff has simply alleged that the corporate defendant, and various officers and employees within the corporate system, engaged in the conspiracy to deprive her of federally protected rights.

4. All of the actions complained of by the Plaintiff involve decisions made and actions taken by a single business entity. For purposes of the conspiracy statute, a corporation and its agents are considered to be a single person, which is incapable of conspiring with itself.

5. It is clear that a claim under § 1986 is dependent upon the existence of cognizable claim under § 1985. Since the defendants could not have engaged in a conspiracy as a matter of law, the dependent claim asserted under § 1986 must also fail.

6. The Defendants rely on the attached Memorandum of Law and affidavits submitted in support of this motion. There are no genuine issues of material fact with respect to the claims based on 42 U.S.C. § 1985(3) and § 1986, and summary judgment on those claims is appropriate.

Denver, Colorado
December 3, 1990

Respectfully submitted,

HARDING & OGBORN

s/ Richard Thorgren
Richard L. Thorgren, #11734
Suite 1000
Denver, Colorado 80202
(303) 629-0300

APPENDIX D — MOTION TO DISMISS DATED JUNE 29, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-Z-758

EDNA RUTH HARRIS,

Plaintiff,

v.

AMERICAN MEDICAL INTERNATIONAL, INC.; WALTER WEISMAN; WALTER GEORGE; DAVID GORE; SHIRLEY HOFFMAN; PRESBYTERIAN/ST. LUKE'S MEDICAL CENTER; and JEANNE COAKLEY BEETHE,

Defendants.

MOTION TO DISMISS

Defendants, American Medical International, Inc., Walter Weisman, Walter George, David Gore, Shirley Hoffman, and Jeananne Coakley Beethe, respectfully move the Court, pursuant to Rule 12(b)(6), Fed. R. Civ. P., to dismiss Plaintiff's claim based on 42 U.S.C. § 1981 for failure to state a claim upon which relief can be granted, and to dismiss all claims against Defendant Beethe. As grounds for this Motion, Defendants state:

1. Defendants Walter George, Shirley Hoffman and American Medical Internation, Inc. (AMI), were served with a copy of the Amended Complaint on or about May 10, 1990. Defendants Gore and Beethe were served on about May 16, 1990.

2. Plaintiff's Complaint requests legal and equitable relief

under 42 U.S.C. §§ 1981, 1985(3), 1986, and the Thirteenth Amendment to the Constitution of the United States.

3. Plaintiff alleges that she was unlawfully discharged and that the Defendants conspired with one another to terminate Plaintiff from her job as a licensed practical nurse at AMI because of her race and in retaliation for her having filed a civil rights action for racial discrimination and retaliation against Presbyterian/St. Luke's Medical Center and T. Jeanne Coakley.

4. Plaintiff fails to state a claim for relief under 42 U.S.C. § 1981, and such claim must be dismissed. Claims under § 1981 are limited to those acts of discrimination which impair or impede an individual's specific right to make or enforce a contract. If the discrimination alleged does not impair the making or enforcement of a contract, no relief is available under § 1981. The post-formation act of discharge does not affect an individual's right to make or enforce a contract. *Patterson v. McLean Credit Union,* 109 S. Ct. 2363 (1989). As a result, the Plaintiff has failed to assert a cognizable claim under § 1981.

5. Plaintiff has failed to allege any factual basis for her claims against Defendant Beethe. As Plaintiff is well aware, Defendant Beethe left the employ of Park Manor in August of 1987. The Complaint alleges discriminatory and retaliatory discharge, but Defendant Beethe is conspicuously absent from the allegations in the Complaint. (See Complaint, ¶ 2, 3 and 4). Plaintiff cannot escape dismissal of these claims by the imprecise form of her pleading. *Bryan v. Stillwater Bd. of Realtors,* 578 F.2d 1319, 1321 (10th Cir. 1977).

WHEREFORE, Defendants respectfully move the Court for an Order dismissing Plaintiff's claim under §§ 1981 and

dismissing all claims against Defendant Beethe, and for such other and further relief as the Court deems just and proper.

Denver, Colorado
JUNE 29, 1990

HARDING & OGBORN

BY: s/ RICHARD THORGREN
Richard L. Thorgren, #11734
Sherri A. Heckel, #18832
1200 Seventeenth Street
Suite 1000
Denver, CO 80202
(303) 629-0300

Attorneys for Defendants, American Medical International, Inc., Walter Weisman, Walter George, David Gore, Shirley Hoffman, and Jeanne Coakley Beethe